

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION

CLAYTON JAMES MASCARENA,

Petitioner,

vs.

STATE OF MONTANA – 13TH
JUDICIAL DISTRICT COURT and
the ATTORNEY GENERAL of the
STATE OF MONTANA,

Respondents.

Cause No. CV 12-0159-BLG-SEH-CSO

FINDINGS AND RECOMMENDATIONS OF
UNITED STATES MAGISTRATE JUDGE

On April 15, 2013, this Court issued an Order finding that Mascarena's habeas claims appeared to be procedurally defaulted and barred by the federal statute of limitations. Mascarena was given an opportunity to show why his petition should not be dismissed with prejudice based on the statute of limitations and/or procedural default. His response was due by May 17, 2013. *See ECF 6 at 17.* No response has been filed.

Accordingly, for the reasons set forth in the April 23, 2013 Order, the Court finds that Mascarena's claims are procedurally defaulted and

barred by the applicable statute of limitations. His petition for writ of habeas corpus should be denied.

Certificate of Appealability

“The district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant.” Rule 11(a), Rules Governing § 2254 Proceedings. A certificate of appealability should issue as to those claims on which the petitioner makes “a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). The standard is satisfied if “jurists of reason could disagree with the district court's resolution of [the] constitutional claims” or “conclude the issues presented are adequate to deserve encouragement to proceed further.” *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003) (*citing Slack v. McDaniel*, 529 U.S. 473, 484 (2000)).

Review of Mascarena’s claims plainly demonstrates that he is not entitled to relief as a matter of law. His claims are barred by the applicable statute of limitations and procedural default. The petition presents no open questions and nothing on which reasonable jurists could disagree. The law underlying the claims and their denial is

well-established. A certificate of appealability is not warranted.

Based upon the foregoing, the Court issues the following:

RECOMMENDATIONS

1. The Petition (*DKT 1*) should be DENIED.
2. The Clerk of Court should be directed to enter by separate document a judgment in favor of Respondents and against Petitioner.
3. A certificate of appealability should be DENIED.

NOTICE OF RIGHT TO OBJECT TO FINDINGS & RECOMMENDATIONS AND CONSEQUENCES OF FAILURE TO OBJECT

Pursuant to 28 U.S.C. § 636(b)(1), Mascarena may serve and file written objections to these Findings and Recommendations within fourteen (14) days of the date entered as indicated on the Notice of Electronic Filing. Any such filing should be captioned “Objections to Magistrate Judge's Findings and Recommendations.”

If Mascarena files objections, he must itemize each factual finding to which objection is made and must identify the evidence in the record he relies on to contradict that finding. In addition, he must itemize each recommendation to which objection is made and must set forth the authority he relies on to contradict that recommendation.

Failure to assert a relevant fact or argument in objections to these Findings and Recommendations may preclude Mascarena from relying on that fact or argument at a later stage of the proceeding. A district judge will make a de novo determination of those portions of the Findings and Recommendations to which objection is made. The district judge may accept, reject, or modify, in whole or in part, the Findings and Recommendations. Failure to timely file written objections may bar a de novo determination by the district judge and/or waive the right to appeal.

This order is not immediately appealable to the Ninth Circuit Court of Appeals. Any notice of appeal pursuant to Fed.R.App.P. 4(a), should not be filed until entry of the District Court's final judgment.

DATED this 4th day of June, 2013.

/s/ Carolyn S. Ostby
United States Magistrate Judge